110TH CONGRESS } HOUSE OF REPRESENTATIVES { REPORT
1st Session } { 110–48

PROVIDING FOR CONSIDERATION OF THE BILL (H.R. 985) TO AMEND TITLE 5, UNITED STATES CODE, TO CLARIFY WHICH DISCLOSURES OF INFORMATION ARE PROTECTED FROM PROHIBITED PERSONNEL PRACTICES; TO REQUIRE A STATEMENT IN NONDISCLOSURE POLICIES, FORMS, AND AGREEMENTS TO THE EFFECT THAT SUCH POLICIES, FORMS, AND AGREEMENTS ARE CONSISTENT WITH CERTAIN DISCLOSURE PROTECTIONS, AND FOR OTHER PURPOSES.

MARCH 13, 2007.—Referred to the House Calendar and ordered to be printed

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Mr. HASTINGS of Florida, from the Committee on Rules, submitted the following

R E P O R T

[To accompany H. Res. 239]

The Committee on Rules, having had under consideration House Resolution 239, by a record vote of 9 to 4, report the same to the House with the recommendation that the resolution be adopted.

SUMMARY OF PROVISIONS OF THE RESOLUTION

The resolution provides for consideration of H.R. 985, to amend title 5, United States Code, to clarify which disclosures of information are protected from prohibited personnel practices; to require a statement in nondisclosure policies, forms, and agreements to the effect that such policies, forms, and agreements are consistent with certain disclosure protections, and for other purposes. The resolution provides for one hour and 20 minutes of general debate, with one hour equally divided and controlled by the chairman and ranking minority member of the Committee on Oversight and Government Reform and 20 minutes equally divided and controlled by the chairman and ranking member of the Committee on Homeland Security.

The resolution waives all points of order against consideration of the bill except those arising under clause 9 or 10 of rule XXI. The resolution makes in order an amendment in the nature of a substitute consisting of the text of the bill, modified by the amendments recommended by the Committee on Oversight and Government Reform now printed in the bill, as the original bill for the purpose of further amendment.

The resolution makes in order those amendments printed in this report. The resolution provides one motion to recommit with or

without instructions. Finally, the resolution provides that during consideration in the House of H.R. 985 pursuant to the resolution, notwithstanding the operation of the previous question, the Chair may postpone further consideration of the bill to a time designated by the Speaker.

EXPLANATION OF WAIVERS

The waiver of all points of order against consideration of the bill includes a waiver of clause 4(a) of rule XIII (requiring a three-day layover of the committee report). The waiver is necessary because the Committee on Oversight and Government Reform filed a supplemental report (H. Rept. 110–42, Part 2) with the House on Monday, March 12, 2007 and the bill may be considered by the House as early as Wednesday, March 14, 2007.

COMMITTEE VOTES

The results of each record vote on an amendment or motion to report, together with the names of those voting for and against, are printed below:

Rules Committee record vote No. 63

Date: March 13, 2007.
Measure: H.R. 985.
Motion by: Mr. Dreier.
Summary of motion: To report an open rule.
Results: Defeated 4–9.
Vote by Members: McGovern—Nay; Hastings (FL)—Nay; Matsui—Nay; Cardoza—Nay; Welch—Nay; Castor—Nay; Arcuri—Nay; Sutton—Nay; Dreier—Yea; Diaz-Balart—Yea; Hastings (WA)—Yea; Sessions—Yea; Slaughter—Nay.

Rules Committee record vote No. 64

Date: March 13, 2007.
Measure: H.R. 985.
Motion by: Mr. Diaz-Balart.
Summary of motion: To make in order and provide appropriate waivers for an amendment by Davis, Tom (VA), #4, that would attempt to retain uniformity in the consideration of whistleblower cases in the federal courts by keeping in place the current requirement that all whistleblower appeals go through the United States Court of Appeals for the Federal Circuit rather than opening up appeals to other circuits.
Results: Defeated 4–9.
Vote by Members: McGovern—Nay; Hastings (FL)—Nay; Matsui—Nay; Cardoza—Nay; Welch—Nay; Castor—Nay; Arcuri—Nay; Sutton—Nay; Dreier—Yea; Diaz-Balart—Yea; Hastings (WA)—Yea; Sessions—Yea; Slaughter—Nay.

Rules Committee record vote No. 65

Date: March 13, 2007.
Measure: H.R. 985.
Motion by: Mr. Hastings of Washington.
Summary of motion: To make in order and provide appropriate waivers for an amendment by Hoekstra (MI), #3, that would strike

section 10 of the bill, which extends whistleblower rights to national security employees.

Results: Defeated 4–9.

Vote by Members: McGovern—Nay; Hastings (FL)—Nay; Matsui—Nay; Cardoza—Nay; Welch—Nay; Castor—Nay; Arcuri—Nay; Sutton—Nay; Dreier—Yea; Diaz-Balart—Yea; Hastings (WA)—Yea; Sessions—Yea; Slaughter—Nay.

Rules Committee record vote No. 66

Date: March 13, 2007.

Measure: H.R. 985.

Motion by: Mr. McGovern.

Summary of motion: To report the rule.

Results: Adopted 9–4.

Vote by Members: McGovern—Yea; Hastings (FL)—Yea; Matsui—Yea; Cardoza—Yea; Welch—Yea; Castor—Yea; Arcuri—Yea; Sutton—Yea; Dreier—Nay; Diaz-Balart—Nay; Hastings (WA)—Nay; Sessions—Nay; Slaughter—Yea.

SUMMARY OF AMENDMENTS MADE IN ORDER

(Summaries derived information provided by sponsors.)

1. Stupak (MI): Section 13 of the bill clarifies that instances of political interference with science are to be considered "abuses of authority" and their disclosure therefore protected. The Stupak amendment adds an example of such interference, namely preventing a federal scientist or grantee from publishing or presenting their research. (10 minutes)

2. Platts (PA): This amendment would require that the Merit Systems Protection Board rely on a consistent standard for "clear and convincing evidence" as the burden of proof that must be met to sustain an agency's affirmative defense (that it would have taken the same personnel action independent of an employee's protected conduct). Under the amendment, "clear and convincing evidence" would be defined as "evidence indicating that the matter to be proved is highly probable or reasonably certain." (10 minutes)

3. Platts (PA): This amendment would clarify that an otherwise-protected disclosure cannot be disqualified because of the forum in which it is communicated. In addition, the amendment would extend equal burdens of proof and individual rights of action to those serving as witnesses in Inspector General or Special Counsel investigations, as well as to those who allege retaliation for refusing to violate the law. (10 minutes)

4. Sali (ID): This amendment would remove the provision that would make influencing federally funded scientific research a prohibited personnel practice. (10 minutes)

5. Tierney (MA): The amendment changes the section on national security whistleblowers to limit which members of Congress can receive information about especially sensitive subjects, such as sources and methods (to members of the intelligence committees or other relevant committees) and special access programs (to defense committees), and for other programs (to committees with oversight over the program in question). (10 minutes)

TEXT OF AMENDMENTS MADE IN ORDER UNDER THE RULE

1. AN AMENDMENT TO BE OFFERED BY REPRESENTATIVE STUPAK OF MICHIGAN, OR HIS DESIGNEE, DEBATABLE FOR 10 MINUTES

Page 28, line 19, strike "and".
Page 28, line 21, strike "technical.'." and insert "technical; and".
Page 28, after line 21, add the following:

"(3) any action that restricts or prevents an employee or any person performing federally funded research or analysis from publishing in peer-reviewed journals or other scientific publications or making oral presentations at professional society meetings or other meetings of their peers.".

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2. AN AMENDMENT TO BE OFFERED BY REPRESENTATIVE PLATTS OF PENNSYLVANIA, OR HIS DESIGNEE, DEBATABLE FOR 10 MINUTES

Strike the heading for section 3 and insert the following (and amend the table of contents accordingly):

SEC. 3. DEFINITIONAL AMENDMENTS.

In section 3, insert "(a) DISCLOSURE.—" before "Section" and add at the end the following:

(b) CLEAR AND CONVINCING EVIDENCE.—Sections 1214(b)(4)(B)(ii) and 1221(e)(2) of title 5, United States Code, are amended by adding at the end the following: "For purposes of the preceding sentence, 'clear and convincing evidence' means evidence indicating that the matter to be proved is highly probable or reasonably certain.".

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3. AN AMENDMENT TO BE OFFERED BY REPRESENTATIVE PLATTS OF PENNSYLVANIA, OR HIS DESIGNEE, DEBATABLE FOR 10 MINUTES

In section 2, in the matter to be inserted by paragraphs (1)(A) and (2)(A) thereof, insert "forum," after "context,".

In section 2, insert "(a) IN GENERAL.—" before "Section" and add at the end the following:

(b) PROHIBITED PERSONNEL PRACTICES UNDER SECTION 2302(b)(9).—Title 5, United States Code, is amended in subsections (a)(3), (b)(4)(A), and (b)(4)(B)(i) of section 1214 and in subsections (a) and (e)(1) of section 1221 by inserting "or 2302(b)(9)(B)-(D)" after "section 2302(b)(8)" each place it appears.

In section 1221(k)(1) of title 5, United States Code (as added by section 9(a)), insert "or 2302(b)(9)(B)-(D)" after "section 2302(b)(8)".

In section 7703(b)(3) of title 5, United States Code (as added by section 9(b)(2)), insert "or 2302(b)(9)(B)-(D)" after "section 2302(b)(8)".

In the matter to be inserted by section 9(d)(2) in section 7703(c) of title 5, United States Code, insert "or 2302(b)(9)(B)-(D)" after "section 2302(b)(8)".

In section 2303a(a)(2)(A) of title 5, United States Code (as amended by section 10(a)), insert "forum," after "context,".

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4. AN AMENDMENT TO BE OFFERED BY REPRESENTATIVE SALI OF IDAHO, OR HIS DESIGNEE, DEBATABLE FOR 10 MINUTES

Strike section 13 (and make all necessary technical and conforming changes).

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5. AN AMENDMENT TO BE OFFERED BY REPRESENTATIVE TIERNEY OF MASSACHUSETTS, OR HIS DESIGNEE, DEBATABLE FOR 10 MINUTES

Page 13, strike line 19, and all that follows through page 24, line 7, and insert the following:

SEC. 10. NATIONAL SECURITY WHISTLEBLOWER RIGHTS.

(a) IN GENERAL.—Chapter 23 of title 5, United States Code, is amended by inserting after section 2303 the following:

"§ 2303a. National security whistleblower rights

"(a) PROHIBITION OF REPRISALS.—

"(1) IN GENERAL.—In addition to any rights provided in section 2303 of this title, title VII of Public Law 105–272, or any other provision of law, an employee or former employee in a covered agency may not be discharged, demoted, or otherwise discriminated against (including by denying, suspending, or revoking a security clearance, or by otherwise restricting access to classified or sensitive information) as a reprisal for making a disclosure described in paragraph (2).

"(2) DISCLOSURES DESCRIBED.—A disclosure described in this paragraph is any disclosure of covered information which is made—

"(A) by an employee or former employee in a covered agency (without restriction as to time, place, form, motive, context, or prior disclosure made to any person by an employee or former employee, including a disclosure made in the course of an employee's duties); and

"(B) to an authorized Member of Congress, an authorized official of an Executive agency, or the Inspector General of the covered agency in which such employee or former employee is or was employed.

"(b) INVESTIGATION OF COMPLAINTS.—An employee or former employee in a covered agency who believes that such employee or former employee has been subjected to a reprisal prohibited by subsection (a) may submit a complaint to the Inspector General and the head of the covered agency. The Inspector General shall investigate the complaint and, unless the Inspector General determines that the complaint is frivolous, submit a report of the findings of the investigation within 120 days to the employee or former employee (as the case may be) and to the head of the covered agency.

"(c) REMEDY.—

"(1) Within 180 days of the filing of the complaint, the head of the covered agency shall, taking into consideration the report of the Inspector General under subsection (b) (if any), determine whether the employee or former employee has been subjected to a reprisal prohibited by subsection (a), and shall either issue an order denying relief or shall implement corrective action to return the employee or former employee, as near-

ly as possible, to the position he would have held had the reprisal not occurred, including voiding any directive or order denying, suspending, or revoking a security clearance or otherwise restricting access to classified or sensitive information that constituted a reprisal, as well as providing back pay and related benefits, medical costs incurred, travel expenses, any other reasonable and foreseeable consequential damages, and compensatory damages (including attorney's fees, interest, reasonable expert witness fees, and costs). If the head of the covered agency issues an order denying relief, he shall issue a report to the employee or former employee detailing the reasons for the denial.

"(2)(A) If the head of the covered agency, in the process of implementing corrective action under paragraph (1), voids a directive or order denying, suspending, or revoking a security clearance or otherwise restricting access to classified or sensitive information that constituted a reprisal, the head of the covered agency may re-initiate procedures to issue a directive or order denying, suspending, or revoking a security clearance or otherwise restricting access to classified or sensitive information only if those re-initiated procedures are based exclusively on national security concerns and are unrelated to the actions constituting the original reprisal.

"(B) In any case in which the head of a covered agency re-initiates procedures under subparagraph (A), the head of the covered agency shall issue an unclassified report to its Inspector General and to authorized Members of Congress (with a classified annex, if necessary), detailing the circumstances of the agency's re-initiated procedures and describing the manner in which those procedures are based exclusively on national security concerns and are unrelated to the actions constituting the original reprisal. The head of the covered agency shall also provide periodic updates to the Inspector General and authorized Members of Congress detailing any significant actions taken as a result of those procedures, and shall respond promptly to inquiries from authorized Members of Congress regarding the status of those procedures.

"(3) If the head of the covered agency has not made a determination under paragraph (1) within 180 days of the filing of the complaint (or he has issued an order denying relief, in whole or in part, whether within that 180-day period or thereafter, then, within 90 days after such order is issued), the employee or former employee may bring an action at law or equity for de novo review to seek any corrective action described in paragraph (1) in the appropriate United States district court (as defined by section 1221(k)(2)), which shall have jurisdiction over such action without regard to the amount in controversy. An appeal from a final decision of a district court in an action under this paragraph may, at the election of the appellant, be taken to the Court of Appeals for the Federal Circuit (which shall have jurisdiction of such appeal), in lieu of the United States court of appeals for the circuit embracing the district in which the action was brought.

"(4) An employee or former employee adversely affected or aggrieved by an order issued under paragraph (1), or who

seeks review of any corrective action determined under paragraph (1), may obtain judicial review of such order or determination in the United States Court of Appeals for the Federal Circuit or any United States court of appeals having jurisdiction over appeals from any United States district court which, under section 1221(k)(2), would be an appropriate United States district court. No petition seeking such review may be filed more than 60 days after issuance of the order or the determination to implement corrective action by the head of the agency. Review shall conform to chapter 7.

"(5)(A) If, in any action for damages or relief under paragraph (3) or (4), an Executive agency moves to withhold information from discovery based on a claim that disclosure would be inimical to national security by asserting the privilege commonly referred to as the 'state secrets privilege', and if the assertion of such privilege prevents the employee or former employee from establishing an element in support of the employee's or former employee's claim, the court shall resolve the disputed issue of fact or law in favor of the employee or former employee, provided that an Inspector General investigation under subsection (b) has resulted in substantial confirmation of that element, or those elements, of the employee's or former employee's claim.

"(B) In any case in which an Executive agency asserts the privilege commonly referred to as the 'state secrets privilege', whether or not an Inspector General has conducted an investigation under subsection (b), the head of that agency shall, at the same time it asserts the privilege, issue a report to authorized Members of Congress, accompanied by a classified annex if necessary, describing the reasons for the assertion, explaining why the court hearing the matter does not have the ability to maintain the protection of classified information related to the assertion, detailing the steps the agency has taken to arrive at a mutually agreeable settlement with the employee or former employee, setting forth the date on which the classified information at issue will be declassified, and providing all relevant information about the underlying substantive matter.

"(d) APPLICABILITY TO NON-COVERED AGENCIES.—An employee or former employee in an Executive agency (or element or unit thereof) that is not a covered agency shall, for purposes of any disclosure of covered information (as described in subsection (a)(2)) which consists in whole or in part of classified or sensitive information, be entitled to the same protections, rights, and remedies under this section as if that Executive agency (or element or unit thereof) were a covered agency.

"(e) CONSTRUCTION.—Nothing in this section may be construed—

"(1) to authorize the discharge of, demotion of, or discrimination against an employee or former employee for a disclosure other than a disclosure protected by subsection (a) or (d) of this section or to modify or derogate from a right or remedy otherwise available to an employee or former employee; or

"(2) to preempt, modify, limit, or derogate any rights or remedies available to an employee or former employee under any other provision of law, rule, or regulation (including the Lloyd-La Follette Act).

No court or administrative agency may require the exhaustion of any right or remedy under this section as a condition for pursuing any other right or remedy otherwise available to an employee or former employee under any other provision of law, rule, or regulation (as referred to in paragraph (2)).

"(f) DEFINITIONS.—For purposes of this section—

"(1) the term 'covered information', as used with respect to an employee or former employee, means any information (including classified or sensitive information) which the employee or former employee reasonably believes evidences—

"(A) any violation of any law, rule, or regulation; or

"(B) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety;

"(2) the term 'covered agency' means—

"(A) the Federal Bureau of Investigation, the Office of the Director of National Intelligence, the Central Intelligence Agency, the Defense Intelligence Agency, the National Geospatial-Intelligence Agency, the National Security Agency, and the National Reconnaissance Office; and

"(B) any other Executive agency, or element or unit thereof, determined by the President under section 2302(a)(2)(C)(ii)(II) to have as its principal function the conduct of foreign intelligence or counterintelligence activities;

"(3) the term 'authorized Member of Congress' means—

"(A) with respect to covered information about sources and methods of the Central Intelligence Agency, the Director of National Intelligence, and the National Intelligence Program (as defined in section 3(6) of the National Security Act of 1947), a member of the House Permanent Select Committee on Intelligence, the Senate Select Committee on Intelligence, or any other committees of the House of Representatives or Senate to which this type of information is customarily provided;

"(B) with respect to special access programs specified in section 119 of title 10, an appropriate member of the Congressional defense committees (as defined in such section); and

"(C) with respect to other covered information, a member of the House Permanent Select Committee on Intelligence, the Senate Select Committee on Intelligence, the House Committee on Oversight and Government Reform, the Senate Committee on Homeland Security and Governmental Affairs, or any other committees of the House of Representatives or the Senate that have oversight over the program which the covered information concerns; and

"(4) the term 'authorized official of an Executive agency' shall have such meaning as the Office of Personnel Management shall by regulation prescribe, except that such term shall, with respect to any employee or former employee in an agency,

include the head, the general counsel, and the ombudsman of such agency.".

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